ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington. D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 402(b)(1)(A)	)	CC Docket No. 96-187
of the Telecommunications Act of 1996	)	
	)	

COMMENTS OF
AMERICA'S CARRIERS TELECOMMUNICATIONS ASSOCIATION
"ACTA"
OCTOBER 9, 1996

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SUMMARY

America's Carriers Telecommunication Association ("ACTA") comments on the Notice of Proposed Rulemaking issued in CC Docket No. 96-187 on the implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996.

ACTA submits that Congress did not intend to preclude the use of Section 203(b)(2)'s 120 day deferral procedure (NPRM 6) . To find otherwise would be contrary to the principle of statutory construction that statutes are to be interpreted so as to give effect to all of their terms. To find otherwise would also amount to an implied repeal of Section 203(b)(2), which would also be contrary to principles of statutory construction. Additionally, such an interpretation would be contrary to Congress' long-time policy of carefully balancing the rights of carriers to initiate tariffs with the customers' rights to avoid imposition of unfair or unlawful terms, conditions, or prices.

ACTA submits that "deemed lawful" in Section 204(a)(3) should be interpreted to simply provide a presumption imposing a high burden of proof if suspension and investigation is to be obtained against a LEC tariff. It should not be interpreted to immunize LECs from liability for any period of time if the tariff causes damages to those to which it applies or affects.

ACTA supports the Commission's tentative conclusion (NPRM 19) that if LECs elect to file on longer notice periods, the tariffs would not be analyzed under the "deemed lawful" standard, provided that this standard is a procedural one only and does not operate to alter substantive rights and obligations.

ACTA supports experimentation with the use of carriers maintaining their own electronic file of tariffs subject to Commission requirements (NPRM 22).

CC Dkt 96-187- § III
ACTA, Oct. 9, 1996

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The comments of America's Carriers Telecommunication Association ("ACTA") on the Notice of Proposed Rulemaking issued in this Docket on September 6, 1996 ("NPRM") are as follows. All references to Sections herein are to the Communications Act of 1934, as amended, unless otherwise stated.

III. STREAMLINED LEC TARIFF FILINGS UNDER SECTION 402 OF THE 1996 ACT

While it does appear that Congress intended to change the period for pre-effective review of certain LEC tariffs (NPRM 5), it does not necessarily follow that Congress thereby also intended to preclude the use of Section 203(b)(2)'s 120 day deferral procedure (NPRM 6). To the contrary, given that Congress could have explicitly repealed Section 203(b)(2) if it intended that such deferral procedures were no longer to be used, but did not do so, the conclusion should be that Congress did not mean to prevent the Commission from resort to this procedure if deemed necessary to protect the public interest.

Support for this interpretation is moreover readily found in the plain language of Section 204(a)(3). Any tariff provision "shall be deemed lawful and shall be effective ... unless the

Commission takes action under paragraph (1) before the end of that 7-day or 15-day period as appropriate."

It is an axiom of statutory construction that statutes are to be interpreted so as to give effect to all of their terms. *Moskal v. United States*, 498 U.S. 103, 109 (1990), *citing United States v. Menasche*, 348 U.S. 528, 538-539 (1955), quoting *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883); *see also Pennsylvania Dept. of Public Welfare v. Davenport,* 495 U.S. 552, 562 (1990). An interpretation that reads plain language out of the Act, for example, by rendering express terms inapplicable to any event or circumstance and hence, meaningless, is not consistent with basic and established principles of construction.

If Congress intended to preclude continued use of the Commission's 120 day deferral procedure, then to what tariffs is Section 203(b)(2) to apply? The Commission should not interpret Congress' intent as having meant to work an implied repeal of Section 203(b)(2). *United States v. Smith*, 499 U.S. 160, 169 (1991) ("... the well-established principle of statutory interpretation that implied repeals should be avoided"). *Also see, e.g., Randall v. Loftsgaarden*, 478 U.S. 647, 661 (1986).

More compelling an argument perhaps rests on the language Congress did use in Section 204(a)(3). Clearly Congress reposed in the Commission the discretion to override, in some fashion, the ability of LEC tariff filings to become effective and to overcome their presumption of lawfulness. Congress did not narrowly define the Commission's discretion, nor did it dictate to it the precise scope of the exercise of that discretion. Congress' language in Section 204(a)(3) is very

clear: LEC tariffs are to be deemed lawful and become effective except in those cases in which the Commission takes some undefined "appropriate" action.

Given the long-established principle that Congress carefully balances the rights of carriers to initiate tariffs with the customers' rights to avoid imposition of onerous and unfair or unlawful terms, conditions and/or prices (*American Telephone and Telegraph Company v. Federal Communications Commission*, 487 F.2d 865, 872 (1973)), the Commission cannot and should not so quickly interpret Congress' admitted deregulatory goals for the 1996 Act as intending to shift all the benefits of an admittedly truncated pre-effective tariff review process away from customers and solely in favor of LECs.

An equally venerable principle of statutory construction offers further guidance. This principle requires that if a reasonable interpretation of Congressional intent can be found that provides meaning to express language and avoids an interpretation that would otherwise render such language null and void, such an interpretation is to be followed. Here a more reasonable interpretation of Congress' intent that does not read the express language out of Section 204(a)(3) is readily apparent.

In the vast majority of cases, LEC tariff filings, like other carriers' tariff filings, raise no issue of compliance with the requirements of the Act. Clearly, LEC tariff filings which draw no protest should not be subject to any longer delay in becoming effective than a minimal period of time.[1]

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[1] The Commission should also consider the fact that had Congress intended to undo any resort to use of Section 203(b)(2) deferrals, it could have codified an even shorter time period between filing and effective dates, such as adopting the Commission's one day notice policy applicable to non-dominant carriers. Such action would have effectively precluded the ability of the

Where LEC tariff filings do draw a protest, to counter balance the potential that such protest is merely for dilatory purposes or to gain some competitive edge, Congress placed the onus on protesters to file such within a very short time and empowered the Commission to act to grant or dismiss such protests in a very short time. The extremely short time frames provided can be interpreted to preclude most pre-effective reviews of LEC tariff filings so as to favor competition over competitors' concerns. But, Congress is well aware that there will be the occasional instance in which the balance of the equities favor and the public interest lies in deferring the effectiveness of certain tariff provisions, and outweigh the promotion of freer competition. Hence, Congress should be understood as having preserved the Commission's authority, on its own motion on in response to a facially meritorious protest, to have additional time in which to analyze the merits presented and decide accordingly.

ACTA therefore disagrees with the Commission's tentative conclusion that Congress intended to repeal Section 203(b)(2)'s 120 day deferral procedure (NPRM 6). On the contrary, ACTA submits the tentative conclusion is at odds with Congressional intent as determined by application of long established principles of statutory construction and by the broader public policy consideration of achieving a more balanced approach fair to both LECs and their customers.

The second major question posed by the NPRM is how to interpret the language of Section 204(a)(3) - "deemed lawful." The Commission tentatively concludes that Congress intended a

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Commission (on its own motion or in response to customer or competitor filings) to consider whether or not to invoke its 120 day deferral authority under Section 203(b)(2).

change in regulatory treatment of LEC tariffs by providing that such tariffs are to be "deemed lawful" (NPRM 7).

The Commission focuses on two situations in applying Congress' new language of "deemed lawful." One situation is with the tariff becoming effective without suspension and investigation and the other in which the tariff is suspended and set for investigation. If the Commission does not suspend and investigate a LEC tariff, depending on how the "deemed lawful" language is interpreted will determine whether damages may be awarded in a subsequent prescription or complaint proceeding in which the Commission determines that the tariff violates the Act.

ACTA submits that the proper interpretation of the "deemed lawful" language must rest on proper application of standard principles of statutory construction. These principles start with the proposition that Congress, having given no guidance by way of legislative history as to the specific interpretation of the new language, could not have intended that language to be read as having intended to work a major substantive change in the law or to override other express provisions of the Act. It is therefore significant that Congress did not by express statutory language or through legislative history override the need for LEC tariffs to be reasonable and non-discriminatory as provided by Sections 201 and 202 of the Act. Nor did Congress enact any provision or provide any legislative history by which it may be construed to have intended to narrow or deny a tariff customer its rights to complain about a tariff or to recover overcharges or to seek a remedy for damages imposed by unreasonable and/or unduly discriminatory rates, terms or conditions.

Once again, given both the historical and precedential recognition of Congress' consistent intent to balance the rights of carriers and customers, Congress should not be ascribed an intent to

undo that balance without expressly having said so. Having provided the benefit to the LEC of being able to quickly file effective tariffs and tariff changes, it would be blatantly one sided to also conclude that Congress also intended to immunize the LEC from damages for its violation of other provisions of the Act arising from a tariff allowed to take effect under the streamlined procedures of the 1996 Act. Put another way, providing for streamlined **procedures,** is neither intended to grant a license to ignore substantive provisions of the Act, provisions which both impose duties and consequences for violating those duties; nor to enact an **implied** repeal of those duties.

Moreover, it cannot be argued that Congress considered, deliberated and then consciously decided that the complex issues raised by LEC tariff filings could be fairly determined in the 7 to 15 days allotted for pre-effective review under Section 204(a)(3). Congress is clearly aware of the time required to make decisions on the lawfulness of tariffs. In 1988, Congress enacted an amendment to Section 208 of the Act and established a set time frame by which the Commission is required to adjudicate complaints against carrier tariffs. The time frames set by Congress were 12 months for standard cases and 15 months for complex cases. The 1996 Act reduces the time frame on all complaints to 5 months except for those filed prior to enactment where 12 months remains as the standard. Nothing in the 1996 Act nor in any legislative history indicates that Congress views the time needed to adjudicate tariff issues as requiring anything less than the minimal time provided by Section 208(b), as amended. Nothing having been said directly or indirectly by Congress on this point precludes the Commission from interpreting "deemed lawful" as intending to change substantive rights of customers to recover damages when a tariff taking effect under streamlined procedures is later found on proper analysis to have violated substantive carrier duties under the Act.

Practical considerations also support the interpretation of "deemed lawful" provided by ACTA herein. The Commission may have been indicating its recognition of these considerations when it expressly asked for small carriers to comment on the proper interpretation of the "deemed lawful" language (NPRM 5). LEC tariffs will effect not only end users, but LEC competitors. Small carriers are particularly susceptible to being damaged by unlawful tariff filings.

First, small carriers do not have the resources under today's pre-effective notice periods, much less under the streamlined 7 to 15 days now provided, to monitor and oppose the numerous LEC tariff filings that directly affect the services and prices small carriers need in order to compete against other carriers and against the LECs themselves. Far more than for end users, the inability of competitors to claim damages for unlawful LEC tariff filings will have devastating effects. Indeed, such a scheme is tantamount to a license for the LECs to put competitors, particularly small competitors, out of business. LECs could file anticompetitive tariffs, litigate the issues indefinitely and then if found in violation enjoy immunity from any responsibility for its anti-competitive behavior.

Congress meant to create no such slanted playing field. Without express language in the 1996 Act or in any legislative history, Congress cannot be understood to have intended by streamlining procedures to change substantive rights and obligations and to inject into legislation designed to effect greater competition, a provision which would produce the antithesis of such an overarching public policy goal.

Similarly, without express language in the 1996 Act or in any legislative history, Congress cannot be understood that by streamlining procedures, it intended to exempt LECs from being

subject to damages for filing tariffs found unreasonable and discriminatory; or to substitute a cursory consideration under Section 204(a)(3) of complex issues in 7 to 15 days which Congress recognizes require up to 5 months under Section 208(b) as amended.

ACTA's foregoing analysis therefore requires that the correct and only defensible interpretation of "deemed lawful" is one that simply provides a presumption imposing a high burden of proof if suspension and investigation is to be obtained against a LEC tariff. Under standard principles of statutory construction, a correct appreciation of the overall goals of the 1996 Act, and on the basis of plain common sense and fairness, the intent of Congress can only be read that any rate or tariff filed by a LEC should be deemed lawful for purposes of making the non-final determination of whether the tariff filing requires suspension and investigation; and not that the tariff, by its mere filing by an interested party, has been accorded a status that immunizes it against liability if the tariff causes damages to those to which it applies or affects.

IV. LEC TARIFFS ELIGIBLE FOR FILING ON A STREAMLINED BASIS

With respect to the questions raised on the scope of Section 204(a)(3), that is, whether Congress intended it to apply only to rate increases and decreases and only to new services or also to revisions of existing services, ACTA reserves comment at this time.

ACTA supports the Commission's tentative conclusion (NPRM 19) that if LECs elect to file on longer notice periods, the tariffs would not be analyzed under the "deemed lawful" standard; provided that this is in no way to be construed as departing from ACTA's position that this standard is a procedural one only and does not operate to alter substantive rights and obligations as discussed above (ACTA Comments at 4-7, *supra.*).

ACTA opposes the Commission's tentative conclusion (*Id.*) that it may exercise its forbearance authority over LEC tariffs. Where Congress specifically requires notice periods for specific tariffs (LECs), the Commission is not to use general provisions of the same statute to override the specific provisions.

V. STREAMLINED ADMINISTRATION OF LEC TARIFFS

ACTA supports experimentation with the use of carriers maintaining their own electronic file of tariffs subject to Commission requirements (NPRM 22). Should the Commission receive widespread support for this concept, a further notice of inquiry or rulemaking will likely be necessary to determine what Commission requirements are needed to effect this proposal. As part of those requirements, ACTA would anticipate that the Commission would reserve the right to require a carrier to maintain its electronic files of its tariff or tariffs with the Commission.

For reasons discussed above (ACTA Comments at 1-7, *supra.*), ACTA opposes exclusive reliance on post-effective tariff review as discussed in the NPRM 23. Moreover, the plain language of Section 204(a) limits the Commission's ability to rely exclusively on such reviews.

ACTA supports the Commission's establishment of guidelines of what it will consider as sufficient to warrant suspension and investigation of LEC tariffs (NPRM 25). These guidelines should be based in part on the standards the Commission has applied prior to the enactment of the 1996 Act, but should be articulated and put out for comment so that all interested parties have the same understanding of the rules and standards which are to apply.

ACTA also believes that the Commission should develop procedures, such as using e-mail (NPRM 26) to assist interested parties receive notice of filings in order to expedite filings of

petitions. Otherwise even the truncated 7 or 15 day notices become illusory. Additional delays and expenses could also be created by generating more litigation due to claims based on inadequate notice and by allowing manipulation of filing dates. It is not uncommon practice for carrier to submit tariffs with short notice periods late on Friday afternoons to further reduce the time for review by interested parties. Late Friday submissions ensure the loss of the immediately following two or three (holiday) weekend days for review. For similar reasons, ACTA opposes using calendar days versus business days (*Id.*).

ACTA submits that the Commission should establish the type of tariff data that will be given and that will be given confidential treatment. Given the extremely short periods involved, it appears incumbent on the Commission to devise rules and procedures that make the streamlined procedures demanded by Congress at least as effective as such short notice periods permit. To do less is to abandon any effort to enforce the Act in a fair and even-handed manner. Small carriers are in particular need of clear guidelines since their participation is more dearly costly to them.

ACTA supports mediation procedures if they can be made effective and avoid favoring the larger LECs. In short, mediations in which the LEC is allowed to assert that it will mediate if the opposing party wants to concede the correctness of the LEC's position is not useful.

CONCLUSION

ACTA urges the Commission to adopt rules and policies in implementing Section 402 of the 1996 Act in accordance with the comments submitted herewith. ACTA will review the

comments filed by other parties and may add to its comments in replies to be filed October 24, 1996.

Respectfully submitted,
AMERICA'S CARRIERS
TELECOMMUNICATIONS ASSOCIATION

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